PECHMAN LAW GROUP PLLC
ATTORNEYS AT LAW

488 MADISON AVENUE
NEW YORK, NEW YORK 10022
(212) 583-9500
WWW.PECHMANLAW.COM

December 12, 2016

VIA ECF & MAIL
The Hon. Gabriel W. Gorenstein
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *Castillo. v. M&M Pizza Corp. d/b/a 10th Ave. Pizza & Cafe*,
16 Civ. 0755 (GWG) (Joint Letter-Motion re: Settlement Approval)

Dear Judge Gorenstein:

We represent plaintiff Miguel Castillo ("Plaintiff" or "Castillo") in the above-referenced action. By this Joint Letter-Motion, Castillo and defendants M&M Pizza Corp. d/b/a 10th Avenue Pizza & Café ("Tenth Avenue Pizza") and Mohamed Nassar (collectively, "Defendants," and with Plaintiff, the "Parties") hereby seek Court approval of the settlement they have reached in this matter, as reflected in their Settlement Agreement and Release attached as Exhibit 1 (the "Agreement") and as discussed with the Court on December 5, 2016, and entry of the Stipulation and Order of Dismissal with Prejudice, annexed to the Agreement as Exhibit A.

PROCEDURAL AND FACTUAL HISTORY

Castillo filed his Complaint on February 2, 2016, in which he alleges that he worked as a prep cook at Tenth Avenue Pizza from approximately May 2007 through December 19, 2015. From approximately May 2007 through January 2013, Castillo regularly worked Monday to Friday, 6:00 a.m. to 4:00 p.m., and Saturday from 7:00 a.m. to 9:00 p.m., totaling sixty-four hours per workweek. From approximately February 2013 through December 19, 2015, Castillo regularly worked Monday to Friday, 6:00 a.m. to 4:00 p.m., and Saturday from 9:00 a.m. to 9:00 p.m., totaling sixty-two hours. Castillo further alleges that he did not receive uninterrupted breaks lasting more than twenty minutes per day. Defendants paid Castillo on a weekly salary basis as follows:

Period	Weekly Salary
February 2010 through August 2012	$375
September 2012 through September 2014	$400
October 2014 through February 2015	$550
March 2015 through December 17, 2015	$675

Finally, Castillo claims that defendants did not provide him with wage statements at the end of each pay period or with a wage notice at the start of his employment or whenever there was a change in his salary. Upon these facts, Castillo asserted claims for unpaid overtime wages, spread-of-hours pay, statutory damages, liquidated damages, interest, and attorneys' fees and costs under the Fair Labor Standards Act ("FLSA"), the New York Labor Law ("NYLL"), and the New York Wage Theft Prevention Act ("WTPA").

Defendants, through their first counsel, filed their Answer on March 16, 2016, in which they generally denied most of the material allegations in the Complaint. Although Defendants denied the legal conclusion that Nassar was Castillo's employer under the NYLL and FLSA, they admitted that Nassar hired, set the work schedule and wage rates, and directed the work duties of Castillo. Defendants also admitted Plaintiff's work schedule from February 2013 through December 2015, but denied all other allegations in the Complaint.

On March 28, 2016, the Parties submitted a joint letter to District Judge Woods in anticipation of the initial pretrial conference scheduled for April 4, 2016. At the conference, the Court issued a Civil Case Management Plan and Scheduling Order. On May 31, 2016, the Court issued an Order substituting defense counsel. Washcarina Martinez Alonzo, one of Castillo's attorneys from Pechman Law Group PLLC ("PLG"), withdrew as counsel on July 1, 2016, and was substituted by Gianfranco J. Cuadra of PLG. Because of changes in counsel, the Parties requested an extension of the discovery schedule by joint letter motion dated July 19, 2016, which the Court granted.

Plaintiff served his initial disclosures (with damages calculations annexed for settlement purposes), document requests, and interrogatories on defendants on August 1, 2016. Defendants responded with their own initial disclosures, interrogatories, and document requests on August 5, 2016. Plaintiff served responses and objections to defendants' discovery requests on August 30, 2016, and produced approximately seventy pages of documents, as well as forty images and video recordings. Defendants produced discovery responses on September 5 and 15, 2016, and produced 128 pages of documents, including tax returns for Tenth Avenue Pizza for tax years 2013, 2014, and 2015. Thereafter, Plaintiff took the deposition of Mohammed Nassar, on behalf of himself and on behalf of Tenth Avenue Pizza as its Rule 30(b)(6) designee, on September 30, 2016. Defendants took the deposition of Castillo on October 20, 2016.

Defendants admitted in discovery that they paid Castillo on a weekly salary basis, in the amounts set forth above, and that Castillo regularly worked fifty-two hours per workweek. However, Defendants deny that Castillo worked without lunch breaks and that Castillo did not take days off. Defendants claim, *inter alia*, that Castillo had ten holidays per year, that Tenth Avenue Pizza was closed for four weeks during Hurricane Sandy, and that Castillo is an incredible witness. Defendants further argue that they are not an enterprise engaged in commerce, within the meaning of the FLSA, because their tax returns prove that they never made more than $500,000 in revenues in any year. Notably, defendants' tax returns, which were reviewed by a certified public accountant retained by PLG, demonstrate that Tenth Avenue Pizza is in a precarious financial condition. The restaurant has been operating at a loss since 2013. Accordingly, Defendants argue that even if Castillo were successful at trial, enforcing a judgment against Defendants would prove difficult.

On October 28, 2016, the Parties submitted a joint status letter. Among other issues addressed in the letter, the Parties requested a reference to Magistrate Judge Gorenstein for a settlement conference. On November 4, 2016, the Parties appeared for a status conference before Judge Woods, who scheduled a bench trial to begin on February 13, 2017. By separate Order, Judge Woods referred this case to Judge Gorenstein for a settlement conference. Judge Woods also ordered Defendants to produce several outstanding documents to Plaintiff. Defendants produced those additional documents, totaling approximately 300 pages, on November 25, 2016.

By letter dated November 7, 2016, the Parties requested that the Court schedule a settlement conference. Later that day, Judge Gorenstein issued an Order scheduling a settlement conference for December 5, 2016. Pursuant to that Order, the Parties submitted their confidential settlement position statements via e-mail to Judge Gorenstein on November 29, 2016.

A week later, on December 5, 2016, the parties appeared for a settlement conference before Judge Gorenstein. With the Court's help, and after several rounds of offers and counter-offers, the Parties agreed to settle this matter for $120,000.00 with a fourteen-month payout and put the principal terms of their settlement on the record. The Parties consented to the jurisdiction of Magistrate Judge Gorenstein for all purposes, and the Court stated on the record that it will retain jurisdiction over the action for purposes of enforcing the terms of the Agreement.

Pursuant to the Court's instructions and *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015), the Parties submit this Joint Letter-Motion requesting that the Court approve the settlement and dismiss the action with prejudice, but, as noted on the record, retain jurisdiction over the action for purposes of enforcing the Agreement in the event of default.

THE SETTLEMENT IS FAIR AND REASONABLE

The parties agree that their settlement is fair and reasonable and should be approved by the Court. The Agreement resolves bona fide disputes over sharply contested issues, especially the number of hours that Castillo worked per workweek. As noted above, Castillo contends that he regularly worked between sixty-two and sixty-four hours per workweek. Although Defendants admit that they paid Castillo on a weekly salary basis, they contend that Castillo regularly worked approximately fifty-two hours per workweek. Notably, Defendants argue that Castillo had ten holidays off per year and, in 2012, did not work for four weeks during Hurricane Sandy. If this case continues, the Court would have to resolve these issues of fact at a bench trial based on the conflicting testimony of witnesses from both sides. Should the Court credit Defendants' testimony, Castillo's possible recovery could be significantly reduced.

For example, if the Court accepted most of Plaintiff's allegations, but also determined that Plaintiff did not work overtime hours nine weeks per year, and thirteen weeks in 2012, Castillo's total damages would be reduced by approximately $60,000 to $269,800, of which $93,500 would represent unpaid overtime wages. If the Court credited even more of Defendants' testimony and found that Castillo worked only fifty-two hours per workweek, Castillo's total possible damages would be further reduced to approximately $112,600, of which $48,800 represents unpaid overtime wages.

Logistically, Plaintiff will also face significant issues enforcing a judgment against Defendants should the Pending Action continue. Defendants' tax returns show that they are in a "precarious financial condition" that raises "serious concerns about collectability." *See, e.g.*, *Cortes v. New Creators, Inc.*, No. 15 Civ. 5680 (PAE), 2016 U.S. Dist. LEXIS 79757, at *10 (S.D.N.Y. June 20, 2016) ("In light of defendants' precarious financial condition . . . there is a substantial risk that any judgment plaintiff[] might obtain at trial would prove uncollectable."). "Case law recognizes that potential difficulty in collecting damages militates in favor of finding a settlement reasonable." *Lliguichuzhca v. Cinema 60, LLC*, 948 F. Supp. 2d 362, 365 (S.D.N.Y. 2013). Tenth Avenue Pizza's tax returns show that it has been losing money since 2013. *See id.* (approving FLSA settlement where there was significant risk of no collectability, in part because the defendant had "no assets"). In sum, even if Castillo succeeded on all claims at trial, he may face significant difficultly enforcing a judgment against Defendants. Accordingly, the parties settled this matter in part to avoid costly and prolonged litigation. Should the case continue to trial, Defendants would face significant liability, in addition to increased attorneys' fees and costs, that could drive them into bankruptcy.

To provide closure to the Parties, the Settlement Agreement contains mutual general releases that, although broad, are fair and reasonable under *Cheeks* because they are mutual and this is not a class action. *See, e.g., Plizga v. Little Pol. Rest. Inc.*, No. 15 Civ. 8820 (LAK) (BCM), 2016 U.S. Dist. LEXIS 94859, at *17 (S.D.N.Y. July 18, 2016). The general releases are also reasonable because "plaintiff here is no longer an employee of defendants, reducing the danger that the release was obtained through improper job-related pressure." *Cionca v. Interactive Realty, LLC*, No. 15 Civ. 05123 (BCM), 2016 U.S. Dist. LEXIS 77372, at *11 (S.D.N.Y. June 10, 2016). Likewise, the non-disparagement clause in the Agreement is fair and reasonable under *Cheeks* because it does not bar Castillo from making "truthful statements about his experience working at Tenth Avenue Pizza and litigating and settling the Pending Action." Ex. 1 § 6; *see also Plizga*, 2016 U.S. Dist. LEXIS 94859 at *15 (approving settlement agreement containing non-disparagement clauses as fair and reasonable under *Cheeks* where terms "include a carve-out for truthful statements about plaintiffs' experience in litigating their case").

Under the Agreement, Defendants will pay Castillo $120,000.00 in fourteen installment payments from January 30, 2017, through February 15, 2018. *See* Agreement § 4(A). The first $55,000.00 of the Settlement Payment are due by January 30, 2017, followed by thirteen payments of $5,000.00, each due by the fifteenth of each subsequent month. *See id.*

Considering the length of the payout, the Court agreed to retain jurisdiction over this case for purposes of enforcing the terms of the Agreement. Any default will be addressed before Your Honor, who brokered the settlement. Defendants are also executing a confession of judgment in favor of Castillo that provides for liquidated damages if Defendants fail to cure a default within a five (5) business day notice period. The liquidated damages provision doubles all outstanding installment payments under the Agreement and makes them immediately due to Plaintiff.

Plaintiff's counsel, PLG, calculated Castillo's total damages to be $328,969.34, of which $114,914.56 represents unpaid overtime wages, based on the allegations in the Complaint. However, PLG also calculated Castillo's total damages to be $136,261.19, of which $60,082.32 represents unpaid overtime wages, based on the undisputed facts in this case. Under both sets of facts, Castillo's damages equal:

Claim	Based on Complaint	Based on Defs.' Facts
Overtime Wages	$114,914.56	$60,082.32
Spread-of-Hours Pay	$2,341.25	$2,341.25
WTPA – Notice	$5,000.00	$2,500.00
WTPA – Statements	$5,000.00	$5,000.00
FLSA Liquidated Damages	$61,751.36	$33,682.56
NYLL Liquidated Damages	$101,438.63 ($39,687.27 if not stacked)[1]	$19,233.19 (not stacked)
NYLL Interest	$38,523.54	$13,421.87
Total Damages	**$328,969.34 ($267,217.98 if not stacked)**	**$136,261.19**

The Settlement Payment is reasonable because it exceeds the full amount of unpaid wages that Castillo could successfully recover at trial. Should the Court credit Defendants' testimony, however, the Settlement Payment represents a significant recovery of most of the sums owed to Castillo. After attorneys' fees and costs, Castillo will receive $78,729.23, which is more than the amounts owed to Castillo for unpaid overtime wages, spread-of-hours pay, and Wage Theft Prevention Act damages combined under the facts that Defendants admitted. Indeed, this amount accounts for some of Castillo's liquidated and statutory damages, and does away with the collection issues discussed above, which Castillo would face should he succeed at trial.

Pursuant to the retainer agreement between Castillo and counsel, PLG's fees and costs total $41,270.77, which equals 33.3% of the Settlement Payment after

[1] Two days after the settlement conference, the Second Circuit addressed a split among the district courts regarding double or "stacked" liquidated damages and held that "New York's law does not call for an award of New York liquidated damages over and above a like award of FLSA liquidated damages." *Chowdhury v. Hamza Ex. Food Corp.*, No. 15-3142-cv, 2016 U.S. App. LEXIS 21870, at *2 (2d Cir. Dec. 7, 2016).

reimbursements of costs incurred in the prosecution of this action. *In re Lawrence*, 24 N.Y.3d 320, 339 (2014) ("Absent incompetence, deception or overreaching, contingent fee agreements that are not void at the time of inception should be enforced as written."); *Plizga*, 2016 U.S. Dist. LEXIS 94859, at *16-17 ("[A]ttorneys' fee awards of one third or less of the total settlement amount are, in most cases, considered reasonable in this District."); *Janko v. Patsy's Italian Rest., Inc.*, No. 15 Civ. 4995 (RLE), at *2 (S.D.N.Y. June 10, 2016) ("The Court further finds that attorneys' fees in the amount of . . . thirty-three percent of the settlement award, are reasonable. Although the amount is greater than counsels' lodestar . . . , retainer agreements containing contingency fees of one-third are standard in FLSA cases and routinely approved by courts in this Circuit.").[2] It bears noting that PLG's lodestar currently exceeds $42,000. As such, we believe that the contingency fee in this case is fair and reasonable, particularly because it is less than the lodestar and because Castillo accepts it.

We thank the Court for its time and consideration of this matter and for helping the Parties to settle their dispute.

Respectfully submitted,

Gianfranco J. Cuadra

cc: Argilio Rodriguez, Esq.
Encl.

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[2] Costs in this matter, totaling $1,906.15, are for:

PLG Expense Incurred & Description	Amount
Filing fee in the Southern District of New York.	$400.00
Stenographer & deposition transcript of Mohamed Nassar.	$575.30
Videographer for deposition of Mohamed Nassar.	$415.00
FedEx of subpoena to Fred Roth, CPA of defendants.	$15.85
Fred Roth deposition cancellation – stenographer fee.	$150.00
Fred Roth deposition cancellation – videographer fee.	$250.00
Review of defendants' tax returns by Michael Wilder, CPA.	$100.00

Copies of invoices for these costs, as well as PLG's time records for each attorney who billed in this matter, are available for the Court's review if necessary.